

S. Scott Bowser v. U.S. General Accounting Office

Docket No. 06-200-17-81

Date of Decision: September 30, 1981

Cite as: Bowser v. GAO (9/30/81)

Before: Levan (Panel Chair), Gallas and Bussey, Members

Disparate Treatment in Promotion

Background

On May 12, 1981, a Petition for Review was filed with the Board by S. Scott Bowser regarding his non-promotion to GS-201-12 due to prohibited discrimination on the basis of race (Black).¹ At the completion of his investigation, the General Counsel submitted to the Board his Petition for Review and Report and Recommendations, in accordance with 4 C.F.R. §28.17. A copy of the Petition was served on the agency on June 26, 1981. Also on that date, the Petitioner requested a hearing in this matter. By letter dated July 6, 1981, the parties were advised that a hearing was to be held on August 18, 1981, at 9:30 a.m., at the GAO Headquarters Building in Washington, D.C.

On July 31, 1981, the Board received the Agency's response to the Petition and Motion to Disqualify Personnel Appeals Board General Counsel and Motion to Stay. The General Counsel responded to said Motion by referencing his Memorandum of Points and Authorities submitted in the case of Shaller v. GAO, Docket No. 02-102-04-81.

By letter dated August 5, 1981, the Presiding Board Member advised the parties of a pre-hearing conference scheduled for August 11, 1981.

On August 6, 1981, the General Counsel of the Board requested a restraining order against management intimidation of GAO employee-witnesses. The Presiding Board Member issued such a restraining order. However, on August 7, 1981, the General Counsel withdrew his request for a restraining order, which was accordingly terminated.

Beginning at 10:35 a.m. on August 18, 1981, a hearing was held in the Headquarters Building of the GAO on this case. The hearing was concluded that day. There were no post-hearing briefs submitted. However, an extensive administrative record, including joint exhibits, was developed in this case.

Findings of Fact

Petitioner was a GS-201-12 Personnel Management Specialist at the Department of the Navy. He responded to GAO Job Opportunity Announcement No. 80-1026 for a GS-12/13 position which Announcement² stated:

“Applicants for the GS-13 level must have a minimum of one year of specialized experience at GS-12.

The Petitioner was ranked third on a list of eight eligibles on the Certificate of Eligibles for the position in question. He was one of three individuals interviewed for the position. His initial interview, with Mr. John J. McGrath, Chief of the Policy Development and Evaluation Branch, Personnel Division, occurred on February 27, 1980. The first (white, female) and second (white, male) eligibles on the Certificate declined the position. Accordingly, on March 14, 1981, the Petitioner was interviewed a second time by Mr. McGrath and Mr. Pat Nobles, Group Manager of Personnel Policy and Programs Group, Personnel Division (T 15). During both interviews, the Petitioner inquired specifically as to the time frame for promotion from his GS-12 to a GS-13 position and the appropriate GAO policy in this regard. While it is not entirely clear from the record³ precisely what was stated, it appears that McGrath advised Petitioner that a minimum period of ninety (90) days applied. The Petitioner has alleged that it was his understanding that he would be eligible for promotion 90 days after his appointment date, April 7, 1980, even though he would not have been in grade for one year until September 2, 1980. Contrastingly, McGrath states that while he did advise Petitioner of the 90-day time period, this 90-day time period meant 90 days after completion of the one year time-in-grade restriction. Nobles did not testify at the hearing and in his affidavit (EEO Complaint Exhibit G) he denied having discussed this 90-day time period with Petitioner.

On April 7, 1980, the Petitioner reported for duty. Petitioner's immediate supervisor was John McGrath. On or about April 25, 1980, in a conversation with Petitioner, the issue of the time period for Petitioner's promotion to the GS-13 level was again raised. While the parties to this conversation differ in their recollection of what occurred (T 35-6,110), within approximately one month of reporting to duty at GAO, Petitioner was assigned without objection, to the GAO Personnel Task Force (T 100,119-120). His supervisor was Mr. William Smith, EEO Project Manager for this Task Force (T 129-130). Petitioner further alleged (T 101-102) that he had at least two conversations with McGrath regarding the effects of the Task Force assignment on his promotion to a GS-13 level, and that he was told by McGrath that he would be evaluated for promotion irrespective of the assignment. McGrath (T 35-36,66) testified, however, that no such promise was given by him to Petitioner. In any event, when Petitioner completed his Task Force assignment in mid-October 1980 (T 105,121), he again reported to McGrath. Although he was eligible⁴ for promotion to the GS-13 level as of September 2, 1980 (T 61), McGrath did not make a concerted effort to promote the Petitioner, who left GAO in early 1981 for promotion to the GS-13 level at the U.S. Department of the Treasury, where he is currently employed. Indeed, the record in this case indicates that once Petitioner had become convinced that McGrath would not live up to Petitioner's understanding of the Respondent's original agreement to promote him after 90 days on board at GAO, or at least to promote him on his anniversary date of September 2, 1980, Petitioner actively sought employment with another Federal agency.

The record also reveals that Petitioner's performance with the Task Force was at a level which, in the view of his project supervisor, Mr. Smith, justified promotion to the GS-13 level (T 131-132).

The record also reveals that Petitioner alleged that McGrath refused to consider Petitioner for promotion for reasons related to race or on the pretext of a policy of waiting a minimum time-in-grade period of 15 months, which pretext was racially motivated. McGrath, of course, denied these allegations in his affidavit and at the hearing.⁵ Petitioner did present persuasive evidence at the hearing that there was no general policy in GAO mandating a delay in his promotion to the GS-13 level (in particular, see the testimony of Oliver Lewis, T 141-181.). However, Petitioner did not produce a single witness to substantiate his principal allegation here: that his non-promotion at GAO was based upon discrimination by McGrath, Nobles or other managers against Petitioner because of Petitioner's race. Although Petitioner claimed that at least one GAO employee, Ms. Grace D. Wilkes, overheard such a conversation which would support

that allegation, she did not testify at the hearing and her affidavit is to the contrary.

Analysis

Since the contentions of the parties were fully aired at the hearing and have been addressed in the Findings of Fact, they will not be repeated here.⁶

Essentially, the issue in this case is whether the Petitioner was denied a promotion on the basis of his race. The evidentiary standard applicable to such cases was originally articulated by the Supreme Court in McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). The Supreme Court of the United States reaffirmed the applicability of the McDonnell Douglas standard in Texas Department of Community Affairs v. Burdine 25 FEP Cases 113, 115 (1981), as follows:

"First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case, of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'... Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

While a number of decisions by Federal Circuits have suggested a modification of the McDonnell Douglas standard in cases of promotion,⁷ as most recently articulated in Hagans v. Andrus, 25 FEP Cases, 503 (9th Cir. 1981), the proper test is whether the evidence is sufficient to create an inference that race was the likely reason for the denial of the complainant's promotion.

In order to demonstrate that a complainant's non-promotion was premised principally or primarily on the basis of race, one may rely on circumstantial evidence in the absence of overt racial hostility. Nevertheless, the mere allegation that non-promotion was based on considerations of race rather than merit must be founded upon more than the mere supposition of the complainant. Applying the McDonnell Douglas standard to this case, it is clear that Petitioner satisfied the first three of the four pronged test of McDonnell Douglas.⁸ Since the promotion of Petitioner would have been on a non-competitive basis, the fourth test would be whether the supervisory level employees of Respondent having responsibility to exercise judgment under the promotion system, indicated by conduct or words, a predisposition towards discrimination against Petitioner and others of his racial minority. While we do not believe the evidence in this case demonstrates that Petitioner has satisfied that fourth test, since the Respondent did articulate a nondiscriminatory reason for the Petitioner's non-promotion, i.e., the policy of McGrath not to evaluate employees for promotion until 90 days after completion of the minimum waiting period, the burden then shifted to the Petitioner to prove by a preponderance of the evidence that the reasons offered by the Respondent were not its true reasons, but rather were a pre-text for racial discrimination against the Petitioner.

A review of the record in this case reveals strong evidence that representations were made to the Petitioner by McGrath, at least during the first interview of the Petitioner, that Petitioner could expect to be promoted within 90 days after his entry on duty with the Respondent. Additionally, there is no uniform

policy within the General Accounting Office regarding minimum time-in-grade for consideration of employees for promotion to the next higher grade level with regard to both competitive and non-competitive promotions.

We would conclude that there was a reneging on the promise made to the Petitioner and that there were no policy obstacles preventing the fulfillment of Respondent's promise to Petitioner.⁹ We stop short, however, of finding that Respondent's failure was discriminatorily motivated. Petitioner has offered neither direct nor circumstantial evidence which would attribute discriminatory reasons to Respondent's failure to act on his request. Whatever grievance, administrative or legal, Petitioner may have, it is not one which falls within the jurisdiction of this Board which must, accordingly, deny this appeal.

Decision

Petitioner's request that he be retroactively promoted to a GS-13 level effective September 2, 1980, is denied.

Notes

1. The Petitioner's original complaint also alleged a threat of reprisal by his supervisor John J. McGrath if he filed an EEO complaint, improper detail to the Personnel Task Force and related prohibited personnel practices. However, the sole issue presented before the Board related to non-promotion based on prohibited race discrimination.
2. Consistent with the testimony of Mr. Oliver Lewis (T 176-177), the position in question, if filled at the GS-12 level as here, would permit the incumbent to be promoted to a GS-13 level on a non-competitive basis. (References to the Hearing Transcript shall be identified as "T-[page number]").
3. In Particular, see the testimony of McGrath (T 19-20, H.T.) and Petitioner (T 97-99).
4. While there is evidence on the record in this case that Petitioner could have been promoted in less than 12 months by virtue of a waiver under OPM regulations then in effect, the Respondent made no such offer to or on behalf of Petitioner. Nevertheless, Petitioner may reasonably have believed Respondent would propose such a waiver before completion of the 12-month period.
5. McGrath did, however, testify that he, personally, followed a firm policy that an employee not be considered for promotion until at least 90 days after completion of the minimum time-in-grade period (T 66-69).
6. With regard to respondent's Motion to Disqualify Personnel Appeals Board General Counsel and Motion to Stay, consistent with the Board's decision in Shaller v. GAO, Decision No. M1 (August 11, 1981), that Motion is denied.
7. See, John v. C.A.R.E., Inc., 25 FEP Cases 517 (S.D.N.Y. 1980) and Pettit v. United States, 488 F. 2d 1026 (Ct. Cl. 1973).
8. The four-pronged test is: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. 802, 5 FEP Cases 969 (1981).

9. Counsel for the Respondent ably argued that "possibly poor (management) judgment and lack of prudence" do not constitute discrimination.